No. 126, Original

In the Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA AND
STATE OF COLORADO,

Defendants.

On Exceptions to the Report of the Special Master

REPLY OF PLAINTIFF STATE OF KANSAS

JOHN B. DRAPER
DRAPER & DRAPER LLC
325 Paseo de Peralta
Santa Fe, NM 87501

JEFFREY J. WECHSLER
MONTGOMERY & ANDREWS, P.A.
325 Paseo de Peralta
Santa Fe, NM 87501

DEREK SCHMIDT
Attorney General of Kansas
STEPHEN R. McALLISTER
Solicitor General of Kansas
(Counsel of Record)
JEFFREY A. CHANAY
Deputy Attorney General
CHRISTOPHER M. GRUNEWA
Assistant Attorney General
BURKE W. GRIGGS
Special Assistant Attorney General
BRYAN C. CLARK
Assistant Solicitor General
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
steve.mcallister@trqlaw.com

Counsel for Plaintiff State of Kansas

Becker Gallagher Cincinnati, OH Washington, D.C. 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTRODUCTION 1

I. KANSAS' RESPONSES TO SPECIFIC FACTUAL ASSERTIONS OF NEBRASKA AND COLORADO. 3

A. Nebraska And Colorado Misrepresent The Master's Disgorgement Recommendation. 3

B. Nebraska Has Knowingly Violated The Compact For Many Years. 5

1. Nebraska Exceeded Its Allocation Numerous Times Before 2002. 6

2. The FSS Accounting Procedures The Court Approved In 2003 Created An Annual Accounting That Provides The States With Timely Knowledge Of Any Deficit That Might Exist. 8

3. Nebraska Exceeded Its Allocation In 2003, 2004, 2005, And 2006. 11

a. 2003 11

b. 2004 12

c. 2005 13

d. 2006 14

C. Nebraska Misrepresents The States' Understanding When They Agreed To The Accounting Procedures. 19

1. The Groundwater Model Was An Integral Component Of The FSS. 20

2. The Arbitrator Rejected Nebraska's Contention That Simulated Stream Drying Was A Basis To Rewrite The Accounting Procedures Over The Objections Of Colorado And Kansas. 20

3. Until Colorado Reached A Secret Agreement With Nebraska On The Eve Of Trial, Colorado Agreed With Kansas That The Accounting Procedures, As Written, Accurately Reflected The States' Original Agreement. 24

II. DISGORGEMENT IS APPROPRIATE HERE. 28

A. Nebraska And Colorado Argue For A Cramped View Of This Court's Power To Do Equity In Original Actions Involving Interstate Compacts. 30

1. Nebraska And Colorado Would Unjustifiably Constrict This Court's Discretion To Impose Effective Remedies. 30

2. Nebraska And Colorado Seek To Diminish The Compact By Treating It As An Ordinary Private Contract. 31

B. Disgorgement Is An Appropriate Remedy In This Case, Even If Nebraska Did Not Purposely Violate The Compact. 33

1. The Rationales For Disgorgement Support That Remedy In This Case. 34

2. Disgorgement Does Not Require Intent Or Malice. 39

a. Intentional Misconduct Is Not A Requirement For Disgorgement. 40

b. The Court Enjoys Broad Equitable Power To Impose Effective Remedies In Original Cases. 43

3. The Record Evidence Of Nebraska's Non-Compliance More Than Proves The Propriety Of Disgorgement As A Remedy In This Case. 45

CONCLUSION 49

APPENDIX

Appendix A Table Of Exhibits, Pleadings, And Transcripts Cited In Kansas' Reply Brief App. 1

Appendix B Record Of Nebraska Compact Allocation And Use Of The Republican River [Fold-Out Exhibit] App. 7

TABLE OF AUTHORITIES

CASES

Alabama v. North Carolina,
560 U.S. 330 (2010) 32

Cuyler v. Adams,
449 U.S. 433 (1981) 32

Florida v. Georgia,
58 U.S. 478 (1854) 31

Kansas v. Colorado,
533 U.S. 1 (2001) 44

Kansas v. Colorado,
543 U.S. 86 (2004) 44

Kansas v. Colorado,
556 U.S. 98 (2009) 30, 31, 45

Kentucky v. Dennison,
65 U.S. (24 How.) 66 (1861) 34, 38

New Jersey v. New York,
283 U.S. 336 (1931) 32

Porter v. Warner Holding Co.,
328 U.S. 395 (1946) 31, 42

Texas v. New Mexico,
462 U.S. 554 (1983) 32

Texas v. New Mexico,
482 U.S. 124 (1987) 30

Texas v. New Mexico,
485 U.S. 388 (1988) 31

Virginia v. West Virginia,
238 U.S. 202 (1915) 30

OTHER AUTHORITIES

E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339 (1985) 35, 36, 41

Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925) 32

Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 504 (1980) 35

Rest. (Second) Contracts § 345(d) 35

Rest. (Second) Contracts § 359-360 35

Rest. (Third) Restitution Part III, Ch. 7 34, 40

Rest. (Third) Restitution § 39 34, 35, 36, 37, 42

Rest. (Third) Restitution § 40 34, 38

Rest. (Third) Restitution § 43 41

Rest. (Third) Restitution § 44 34, 37

Rest. (Third) Restitution §§ 49-52 34

Rest. (Third) Restitution § 50 34

Rest. (Third) Restitution § 51 38, 41, 42

Rest. (Third) Restitution § 52 35, 40

Special Master Littleworth's Second Report in *Kansas v. Colorado*, No. 105, Orig. (1997) 43, 44

INTRODUCTION

Nebraska's opening brief demonstrates why this Court should impose remedies sufficiently strong to hold Nebraska accountable for violating the Republican River Compact ("the Compact") and the Final Settlement Stipulation ("the FSS"): Nebraska has yet to accept responsibility for its repeated failures to take appropriate actions to avoid violating the Compact and the FSS. When faced with looming Compact and FSS violations in 2005 and 2006, Nebraska's efforts were feeble and ineffective. Instead of owning up to its role in these repeated violations, Nebraska continues to blame factors allegedly beyond its control. Fundamentally, Nebraska refuses to acknowledge, much less accept, its long history of non-compliance with the Compact and the FSS, including the accounting procedures that were an integral part of the groundbreaking settlement the Court approved in 2003.

Notably, Nebraska and Colorado even misrepresent what Special Master William J. Kayatta, Jr. ("the Master") actually recommended regarding disgorgement of Nebraska's substantial gains from its Compact violations, gains the Master found likely were "several multiples" of the loss to Kansas. Nebraska and Colorado misleadingly act as though the award the Master recommended is enormous and out of bounds. To that end, Nebraska and Colorado go so far as to omit key words from the Master's recommendation, thereby distorting what he actually said. Although Nebraska and Colorado quote the Master as recommending disgorgement of Nebraska's gains, the

Master's actual recommendation was to award only "a *small portion* of" Nebraska's gains.

Nebraska needs strong encouragement from this Court in order to ensure future compliance with the Compact. Perhaps Nebraska never set out deliberately to violate the Compact, but it has in fact violated the Compact multiple times over many years, and often knowing in advance that it likely would exceed its allocations in a given year. As a result, this is a compelling case for disgorgement of Nebraska's ill-gotten gains, and the Master's recommendation to impose such a well-recognized remedy is amply supported by years of evidence.

Nebraska and Colorado—primarily upstream states in general and certainly in this litigation—want the Court to adopt a rule effectively establishing that disgorgement is never a proper remedy in original jurisdiction cases involving interstate water disputes. As Kansas has explained at length in its opening brief (and supports further below), the general principles of disgorgement law—and this Court's broad equitable power in original cases—make clear that disgorgement should be on the table as a realistic potential remedy. Accepting the invitation of Nebraska and Colorado to take disgorgement off the table would seriously undermine the ability of downstream states to enforce their rights under interstate water compacts, agreements that Congress has approved and which have the force of law, not just contract.

Ultimately, Kansas trusts the Court's judgment regarding the appropriate remedies to achieve the equitable goals of this original proceeding. But Kansas beseeches the Court to adopt meaningful and robust

remedies to put an end to a long and sad history of non-compliance with the Compact.

I. KANSAS' RESPONSES TO SPECIFIC FACTUAL ASSERTIONS OF NEBRASKA AND COLORADO.

A. Nebraska And Colorado Misrepresent The Master's Disgorgement Recommendation.

Nebraska's first exception to the Report of the Special Master reads as follows:

> Nebraska excepts to the Special Master's recommendation that, in light of Nebraska's violation of the Republican River Compact, Kansas be awarded $1.8 million, over and above Kansas' actual damages, which "additional amount represents a disgorgement of a portion of the amount by which Nebraska's gain exceeds Kansas' loss." Final Report at 179.

Neb. 1.[1]

---

[1] As in our opening brief, we cite to the record as follows: "Dkt. __" refers to filings on the Master's docket, available at media.ca1.uscourts.gov/special_master/; "K__," "N__," "C__," and "J__" are, respectively, citations to exhibits admitted into evidence at trial by Kansas, Nebraska, Colorado, and all parties jointly; "Tr." refers to the August 2012 trial transcript; and other transcripts are preceded by the docket number, "Dkt. __ Tr. __." Appendix A to this brief contains a table of exhibits, pleadings, and transcripts cited. We cite the narrative text of the FSS to Appendix E to the Master's Report where that portion of the FSS is reprinted. We cite all other portions of the FSS to J1, the joint trial exhibit. "Kan.," "Neb.," and "Colo." refer to the States' respective opening exceptions briefs. "Rep." refers to the Master's Report, "Rep. Errata" refers to the Errata to Report of the Special Master,

Colorado's exceptions brief quotes the Master's disgorgement recommendation as follows:

> I conclude that the monetary award here should be in the amount of $5.5 million. This amount represents an award for the full amount of Kansas' loss, plus an additional amount of $1.8 million. That additional amount represents a disgorgement of the amount by which Nebraska's gain exceeds Kansas' loss.

Colo. 2.

Both Nebraska's and Colorado's versions of the quotation misrepresent the Master's actual disgorgement recommendation. What the Master actually wrote was that the "additional amount represents a disgorgement of a ***small*** portion of the amount by which Nebraska's gain exceeds Kansas' loss." Rep. Errata (dated Nov. 19, 2013) (emphasis added); *see also* Rep. Updated Errata (dated March 25, 2014). Nebraska and Colorado conveniently omit the Master's description of the relationship between his $1.8 million recommendation and what he believed was very likely the much larger *actual amount of Nebraska's gain*. The Master specifically inserted the word "small" in the language on page 179 of the Report in his Errata to Report of the Special Master (dated November 19, 2013).[2]

---

dated November 19, 2013, and "Rep. Updated Errata" refers to the Updated Errata to Report of the Special Master, dated March 25, 2014.

[2] Nebraska's misquotation of the Master's disgorgement recommendation cannot be explained by Nebraska's inadvertently

Although Kansas takes exception to the relatively "small" amount of disgorgement the Master recommends, Kansas contends that the Court should keep disgorgement on the table as an available remedy in cases like this. Nebraska and Colorado, however, effectively advocate a *per se* rule that disgorgement is never available as a matter of law. *See* Tr. 1862:22-25 ("the notion that Nebraska should be required to give up some kind of ill-gotten gain I think is simply legally unavailable") (Wilmoth, counsel for Nebraska). Such a rule would inappropriately tie the Court's hands to do equity in this and future original cases.

B. Nebraska Has Knowingly Violated The Compact For Many Years.

Since the approval and enactment of the Compact in 1943, each State has been required to manage its consumption during the year to ensure that it takes no more than its allocated annual share of the waters of the Republican River Basin ("the Basin"). Compact Art. IV, Rep. App. B, at B5-B8. To administer the Compact, the States established the Republican River Compact Administration ("the RRCA") in 1959. Dkt. 304 at 16 (Barfield Direct); J3 at JT1154. Shortly thereafter, the RRCA approved methods to quantify the water supply, allocations, and water use so that the States could determine compliance with the Compact. Dkt. 304 at 16; J3 at JT1166-JT1180 (first proposed accounting formulas, dated 1961); *id.* at JT1222 (adopting

---

omitting the change the Master made in the Errata. Nebraska includes a portion of the language in the Errata, "a" and "portion of," and only omits the word "small." Colorado omits all of the language the Master added in the Errata.

formulas and accounting results in 1964). Since that time, the formulas have relied on information from the previous year. *E.g.*, J3 at JT1229-JT1240 (1964 formulas); J2 (2010 formulas). For nearly 60 years now—by agreement of the States—Compact accounting has been *backward-looking*, relying on stream, reservoir, and groundwater information from the previous year.

1. Nebraska Exceeded Its Allocation Numerous Times Before 2002.

Over the years, Nebraska has aggressively developed groundwater resources in the Basin, and continued to do so long after Kansas took measures to stop further groundwater development in its upstream portion of the Basin. K24 at KS781. The massive groundwater pumping in Nebraska created a long-term problem, and Nebraska exceeded its Compact allocations numerous times from 1968 to 1991. Appendix B to this brief is a chart from Kansas trial exhibit K24, which shows that Nebraska exceeded its allocation in 1968, 1970, 1976, 1978, 1980, 1986, 1989, 1990, and 1991, sometimes overusing huge amounts of water. *See* K24 at KS764-KS765 (App. B). For example, in 1976 and 1978, Nebraska's statewide overuse was reported to be 97,000 acre-feet and 61,000 acre-feet, respectively. *Id.* at KS728, KS764 (App. B). In response to Nebraska's major and repeated overuse, Kansas began diligent efforts to address Nebraska's overuse at the RRCA, and Kansas' formal notifications to Nebraska featured prominently in the RRCA's annual reports. *Id.* at KS728-KS729. For example, in 1991, Kansas brought a motion that would have required the RRCA member states to "take whatever measures are

necessary to stay within their annual adjusted allocations." Kansas and Colorado both voted yes, but Nebraska voted no, and so the motion failed. *Id.* at KS728-KS729 (citing RRCA 32nd Annual Report, J3 at JT1840). Kansas repeated these concerns in 1992 and 1994. *Id.* at KS729 (citing RRCA 33rd Annual Report, J3 at JT1855A, and RRCA 35th Annual Report, J3 at JT1929).

Despite these formal notices and warnings, Nebraska's overuse continued unabated, to the detriment of Kansas in general, and the federal Bureau of Reclamation's Bostwick Division and the Kansas Bostwick Irrigation District ("KBID") in particular. At the time, because Nebraska voted against the proposed resolutions in the RRCA, Kansas had no recourse other than proceedings in this Court to address Nebraska's overuse. Nebraska's statewide overuse was 37,400 acre-feet for 1989; 32,702 acre-feet for 1990; and 52,260 acre-feet for 1991, as reported in the Annual Reports of the RRCA, which Nebraska approved. *Id.* at KS729.

In agreeing to the FSS in 2002, Kansas made a significant concession when it waived the Compact violation claims it brought for these years, with the understanding that going forward Nebraska would reduce its consumption to comply with its obligations under the Compact and FSS. *See* Rep. App. E § I.C., at E6 (waiving claims based on activities or conditions before December 15, 2002); *see also, e.g.*, *Kansas v. Nebraska*, No. 126, Orig., Bill of Complaint at 7 (seeking to remedy "past and continuing violations") and Brief in Support of Motion for Leave to File Bill of Complaint at 7 (citing Nebraska's Compact violations

in 1978 and 1989 to 1991 as examples to support Kansas' claim).

2. The FSS Accounting Procedures The Court Approved In 2003 Created An Annual Accounting That Provides The States With Timely Knowledge Of Any Deficit That Might Exist.

As the preceding discussion as well as other record evidence demonstrates, when the States signed the FSS, it was "well understood" that Nebraska would have to curtail its consumption of water, including groundwater, to achieve Compact compliance. Rep. 106. Nebraska also "well understood at that time" that reductions in groundwater pumping would have a delayed effect on stream flow because of the "lag effect" of pumping. *Id.* Nebraska concedes that it knew in 2002 that achieving compliance by reducing groundwater consumption required it "to facilitate development of the intrastate rules that would control such consumption." Rep. 106-107. This is because groundwater pumping is regulated locally in Nebraska by natural resource districts ("NRDs"), and groundwater irrigators comprise the majority of the boards that control NRDs. Rep. 110.

The Court's approval of the FSS in 2003 provided the States with agreed-upon accounting procedures to accomplish the annual RRCA accounting. J1 at App. C. At that time, the States and the United States had reached agreement on "calibration targets and methods to estimate groundwater pumping and recharge" using the RRCA Ground Water Model ("the Model"). J1 App. J1, at JT995. The States and the United States finalized work on the Model during the following

months, and the RRCA adopted and approved the Model before July 1, 2003. J5 at JT2880.

In the FSS the States agreed to "determine Virgin Water Supply, Computed Water Supply, Allocations, Imported Water Supply Credit, augmentation credit and Computed Beneficial Consumptive Use based on a methodology set forth in the RRCA Accounting Procedures, attached hereto as Appendix C." Rep. App. E, at E25. The FSS established April 15 as the annual deadline for each State to exchange the necessary data and information from the previous calendar year to complete these calculations. J1 App. C § V, at C48-C57. The required data and information includes, among other things, surface water diversions and irrigated acreage, groundwater pumping and irrigated acreage, climate information, crop irrigation requirements, streamflow records, reservoir information, and Model data input files. J1 App. C, at C48-C57. The RRCA has never altered the April 15 deadline or the list of required information. J2 at JT1118-JT1125 (RRCA Accounting Procedures, amended 2010).

To fully implement the process laid out by the FSS, the RRCA adopted new Rules and Regulations on August 22, 2003. J3 at JT2125. Rule 14 provides that, unless otherwise agreed to by the RRCA, the annual accounting must be completed by the Engineering Committee and submitted to the RRCA no later than June 1 of the year following the year for which the accounting is being done. *Id.* at JT2128 (RRCA Rules and Regulations adopted August 22, 2003).

To summarize, the annual accounting provides each State with the knowledge of any deficit that might exist for a forthcoming compliance period. Under the FSS

and RRCA Rules and Regulations, by April 15 of each year, a State exchanges the data and information necessary to assemble the Compact accounting. Those results will show whether the upcoming irrigation season is one in which Compact compliance requires forbearance to ensure that any deficit resulting from previous overuse is offset. By June 1, the annual accounting for the previous year must be final. Thus, *by June 1*, each State knows its consumption from the previous year and knows whether it is on track to comply with or violate the Compact.

The tests for Compact compliance that the States agreed to in the FSS are based on multi-year averages. Under the States' agreement there are essentially two tests: a two-year-average test for Water-Short Administration Years (the relatively drier years), Rep. App. E § V.B.2.e.i., at E41, that overlaps with a five-year-average test for all years, *id.* § IV.D., at E34. The years 2003 and 2004 were the first two years of the five-year 2003-2007 compliance test. *See* J1 App. B, at B1 (Implementation Schedule). The years 2005 and 2006 were the first years used for the two-year 2005-2006 Water-Short Year Administration test, because 2006 was a Water-Short Administration Year. *Id.* Those two years also were the third and fourth years of the 2003-2007 compliance test. *Id.*

Nebraska knew when it signed the FSS that any overuse during 2003, 2004, 2005, or 2006 would create a deficit that Nebraska would have to offset during some other year within the first compliance periods. Nebraska knew that if it overused during every one of those four years, it would create a cumulative deficit that it would have to make up in the final year of the

five-year 2003-2007 compliance period. Nebraska also knew that if 2006 were a Water-Short Administration Year, overuse in 2005 would create a deficit that Nebraska would have to make up in 2006.

3. Nebraska Exceeded Its Allocation In 2003, 2004, 2005, And 2006.

The record shows that "as soon as the ink was dry on the FSS, [Nebraska] was each year using more than the annual allocation for that year." Tr. 1866:1-3 (Master). Nebraska continued to exceed its Compact allocation in each of the next three years, K24 at KS763, and "overshot it hugely by 40,000 acre-feet in 2005." Tr. 1866:1-5 (Master).

a. 2003

It is undisputed that in 2003 Nebraska knew that it would have to control groundwater pumping to ensure that it complied with the Compact and FSS. On April 9, 2003, the Director of the Nebraska Department of Natural Resources, Roger Patterson, sent a letter to the Lower Republican Natural Resources District ("LRNRD") regarding groundwater use and Compact compliance. K57. Patterson acknowledged that the FSS "may require that in most years Nebraska maintain, or in some years reduce, its existing levels of water consumption within the Republican River Basin to comply with the Compact." *Id.* at KS2867. He then expressed concern regarding the effect of the "approximately 300 new wells [that] have been drilled just prior to the [well] moratorium" imposed as a result of the FSS, *id.*, explaining:

> The consumptive use of water within the LRNRD will increase significantly if and when

> those wells are placed into service. For instance, if each of the 300 new irrigation wells irrigates 100 acres of new land, there will be an additional 30,000 acres of new lands irrigated in the LRNRD. That level of increased water consumption will increase the amount of cutback within the LRNRD that will be needed in a dry year.

Id.

b. 2004

By the spring of 2004, the accounting for 2003 showed that Nebraska had overused by 25,420 acre-feet. Rep. 108.

It is undisputed that in 2004 Nebraska's water officials were aware of the potential problems caused by excessive groundwater irrigation. At the RRCA Annual Meeting on June 9, 2004, Kansas specifically raised concerns about the level of groundwater irrigation in Nebraska. Kansas Compact representative (Chief Engineer David Pope) "expressed Kansas' frustrations regarding the significant new lands being brought into irrigation in the lower basin of Nebraska despite the moratorium on new well drilling." J3 at JT2133A. Nebraska's Compact representative (Director Patterson) responded by suggesting that Nebraska would limit "the number of acres that can be irrigated from each well and the amount of inches that can be applied to those acres under each well." *Id.*

On November 3, 2004, Patterson sent another letter to the LRNRD, a copy of which was sent to the other Republican River NRDs. K58; Rep. 108-109. The letter

alerted the district to the possibility of Water-Short Year Administration for the year 2006, stating:

> Water-Short Year Administration requires that Nebraska limit its Computed Beneficial Consumptive Use above Guide Rock to not more than the portion of our Allocation that is derived from sources above Guide Rock. This determination will be made on a 2 year running average. 2005 will be year 1 of the 2-year average. As you know, 2005 is also year 3 of our 5 year running average for purposes of normal compliance calculations.
>
> If it remains dry it will be critically important to control our water use in 2005 to avoid the need for significant cutbacks in 2006. Therefore, rules need to be in place within each NRD for 2005 that will allow Nebraska to remain in compliance with the Republican River Compact.

K58.

As of 2004, the LRNRD had never imposed limits on groundwater pumping for irrigation. Tr. 1302 (Clements) (first limits imposed in 2005).

c. 2005

Eventually, Nebraska decided to rely on the integrated management plan ("IMP") concept created by the Nebraska Groundwater Management and Protection Act, enacted in 2004, to manage Nebraska's groundwater usage. Rep. 107 In 2005, the Nebraska Department of Natural Resources and Nebraska's three Republican River Basin NRDs—the Upper Republican ("URNRD"), Middle Republican

("MRNRD"), and LRNRD—adopted the first generation of IMPs. The NRDs all adopted companion rules and regulations as well. K26 (URNRD); K27 (MRNRD); K28 (LRNRD). Each of the NRD's rules contained allocations for groundwater irrigators, and all of the NRDs created three-year allocation periods rather than annual ones. K26 at DNR1284 (Rule 8.01); K27 at DNR1031 (Rule 5-3.7.2); K28 at DNR1424 (Rule 7-2.2.5). As a consequence, in each of the three NRDs, there were *no annual limits* on irrigation pumping during 2005 and 2006. The Nebraska Department of Natural Resources approved this approach when it adopted the first generation of IMPs. K44 at KS3363; K45 at DNR5486; K46 at DNR5671.

By the spring of 2005, the accounting results showed an *increasing* deficit. Nebraska's statewide annual balance for 2004 reflected 36,640 acre-feet of *additional* overuse. Rep. 108. Nebraska's overuse in 2004 was nearly 11,000 acre-feet greater than its overuse in 2003. Nonetheless, Nebraska made no modifications to the first generation of IMPs in 2005.

d. 2006

By the spring of 2006, the accounting results showed that, for 2005, Nebraska had exceeded its allocation by an even greater margin than it had in 2004, with Nebraska having 42,860 acre-feet of *additional* overuse, 6,000 acre-feet more than it overused in 2004. Rep. 109. As a result, Nebraska entered the 2006 irrigation season needing to underuse its allocation by 42,860 acre-feet to ensure that it could satisfy the two-year Water-Short Year Administration compliance test, which Nebraska knew was in effect. *See* Tr. 1866:5-15. For the five-year 2003-2007

compliance test, Nebraska had overused 104,385 acre-feet during 2003 through 2005, all of which Nebraska would have to offset by underuse during 2006 and 2007. K24 at KS763. This is a massive amount of water—more than half of Nebraska's allocation for 2005. *Id.* at KS765 (App. B).

By 2006, Nebraska was more than well aware of the problem that unregulated groundwater pumping had created and knew that it had to take serious action to avoid violating the Compact and FSS. In the words of Nebraska's own witness: "[B]y 2006, ... we could clearly see that we had not done enough"; Nebraska had to underuse by a substantial amount in 2006 to comply with its obligations under the Compact and FSS. Rep. 109 (quoting Tr. 1333 (Clements)). Nebraska also was aware that it had not taken any steps to use less water; it had made little or no effort to comply with the Compact and FSS. *Id.* There is "no evidence ... that anyone even attempted to sit down and calculate what would it be necessary to do to get 40,000 under [in 2006] in order to make up for what we just blew through in '05?" Tr. 1866:8-12 (Master).[3] Again in 2006,

---

[3]At trial, the Master exposed Nebraska's intransigence in a colloquy with Nebraska's counsel, Thomas R. Wilmoth, as follows:

> SPECIAL MASTER KAYATTA: ... But isn't the record here that as soon as the ink was dry on the FSS, your client was each year using more than the annual allocation for that year and had overshot it hugely by 40,000 acre-feet in 2005. And the predictions that your client received for the coming year were that it was going to be a water short year and that there's no evidence been presented to me that anyone even attempted to sit down and calculate what would it be necessary to do to get 40,000 under this

Nebraska made no changes to the first generation IMPs, and only "started negotiations" on the second generation IMPs "which ultimately came out in the first part of 2008." Tr. 1334 (Clements).

These facts show that Nebraska knew that if it maintained the status quo it would violate its obligations under the Compact and the FSS in 2005 and 2006. Yet Nebraska utterly failed to take the steps necessary to achieve compliance. Nebraska's unsupported claim that it "literally could not have known even the scope of its potential violation until May 2006," Neb. 18-19, is meritless and flatly contradicted by the record.

---

year in order to make up for what we just blew through in '05? I have seen no evidence that anyone even made a calculation of the steps that would be required.

MR. WILMOTH: Well, your Honor, again—

SPECIAL MASTER KAYATTA: Point me to whatever evidence shows that anyone in Nebraska sat down and had a meeting and said, we just blew through our accounting by 40,000. Here is what we need to do to be under 40,000 in '06.

MR. WILMOTH: Well, I think that the—I can certainly point to you in the record—obviously I don't have the citations off the top of my head. We can do this in the briefing. But I can certainly point you to evidence in the record that shows those dialogues were ongoing. What I can't tell you is that there was a perfect bit of math done to figure out what the underuse would have to be in 2006.

SPECIAL MASTER KAYATTA: Well, how about an imperfect analysis, even the back of an envelope? Is there any evidence that anyone did anything?

Tr. 1865:25-1867:11.

Nebraska also blames the "unprecedented drought" that lasted from 2002 to 2006 for its violation of the Compact and FSS. Neb. 18-19. Yet the precipitation conditions in Nebraska during 2005 and 2006 were easily foreseeable because they were *average*. K54 (Figure 1); Tr. 1333 (Clements) ("I don't know that they were extremely dry years, probably close to average."). Although Nebraska's allocations for 2005 and 2006 were lower than in previous years, its reduced allocation was easily predictable: Nebraska's allocation had been decreasing since 2002. K24 at KS765 (App. B). Instead of trying to adjust to its decreasing allocation, Nebraska made no real effort to curb its well-documented overuse. Kansas, on the other hand, faced with the same conditions as Nebraska, and using the same backward-looking accounting as Nebraska, did what was necessary to comply with its Compact obligations.

Moreover, in response to Kansas' concerns that Nebraska had insufficient central authority to control local groundwater pumping, Nebraska asserted that its Department of Natural Resources had authority to shut down pumping. Rep. 123-124. Yet from 2003 through 2006, while Nebraska knew that its Compact accounting deficit was increasing, Nebraska chose not to use that option:

> SPECIAL MASTER KAYATTA: Is there any evidence in this record that even a single well was shut down in order to try to make up for the 2005 exceedance?

> MR. WILMOTH [Counsel for Nebraska]: I don't think that that was being done.

Tr. 1869:8-13.

Instead of making efforts reasonably calculated to achieve compliance with the Compact and the FSS, Nebraska relied on its inadequate first generation IMPs and took faint-hearted measures that unrealistically relied on the voluntary cooperation of water-strapped irrigators to help Nebraska fill the hole Nebraska had dug for itself.

First, Nebraska hoped that irrigators would enroll lands in two voluntary federal programs for retiring irrigated acreage. Rep. 111. But no more than 4% of the Republican River Basin acreage in Nebraska voluntarily enrolled in that program. Dkt. 304 at 25 (Barfield Direct).

Second, and only for 2006, Nebraska tried to buy some of the limited surface water available, Rep. 111, purchasing the 2006 surface water rights of three irrigation districts in Nebraska, thereby obtaining rights that year to a total of 23,518 acre-feet from the three districts for a benefit of 22,690 acre-feet under the Compact. K82 at DNR7376 (memo from Ann Bleed). At the time of these purchases, this amount equaled only about half of the known overuse from 2005 alone. Combining the overuse from 2005 and 2006, the purchased water represented only one third of Nebraska's total overuse under the Compact.

The Master's reaction to this evidence provides a fair assessment of Nebraska's behavior in 2006:

> [I]f I look at the record and ask questions, given the knowledge that someone had just big-time breached their sovereign agreement with an adjoining state, I don't see any evidence of the type of activity in state government that would indicate there was any sense of urgency to try to do what was necessary to even come remotely within compliance in the next year. And in fact they breached the absolute usage again the following year.

Tr. 1870:5-16 (Master).

Kansas does not seek to dictate what specific actions Nebraska should take to avoid violating the Compact and the FSS. Kansas simply asks this Court to impose effective remedies that will make it worth Nebraska's while to comply with its obligations in the future, and motivate Nebraska to pursue wholehearted and successful Compact compliance measures. Disgorgement is one such remedy.

C. Nebraska Misrepresents The States' Understanding When They Agreed To The Accounting Procedures.

Although Nebraska takes no exception to the Master's findings, conclusions, or recommendations regarding Nebraska's proposed changes to the RRCA accounting procedures, Nebraska's exceptions brief contains several mischaracterizations of the States' understanding of the existing accounting procedures. Kansas addresses each of these mischaracterizations below.

1. The Groundwater Model Was An Integral Component Of The FSS.

Nebraska contends that "[i]n the FSS, the states agreed to ... the development of a groundwater model (the 'Model') to determine stream-flow depletions caused by well pumping and the credit for water imported into the basin (known as the 'Imported Water Supply Credit')." Neb. 5. This statement suggests that the Model was developed *after* the FSS, but it ignores the important fact that all of the essential features of the Model were negotiated and agreed to *as part of* the FSS. *See* J1 App. J; *cf.* Rep. App. E § IV.C.6., at E28 ("The structure of the RRCA Groundwater Model, together with agreed upon architecture, parameters, procedures and calibration targets as of November 15, 2002, are described in the memorandum attached hereto as Appendix J."). While the Model was refined and calibrated shortly after the Court approved the FSS, the Model was already well-developed at the time the FSS was signed by the States and presented to the Court. *See supra* Part I.B.2. This is important because, as described more fully below, the characteristics and output of the Model—in particular, the causes and consequences of its "nonlinearity"—were well-understood by the States when they signed the FSS.

2. The Arbitrator Rejected Nebraska's Contention That Simulated Stream Drying Was A Basis To Rewrite The Accounting Procedures Over The Objections Of Colorado And Kansas.

Nebraska mischaracterizes the run-up to this proceeding by stating that "[t]he Arbitrator further recognized a problem presented by the RRCA

Accounting Procedures." Neb. 6. Nebraska maintains that its 5-Run Proposal will correct a "problem," which the Master attributes to Model simulations of Nebraska's groundwater pumping "when the stream runs dry." Rep. at 34 ("the interaction between groundwater pumping and stream flow is non-linear"). Nebraska fails to explain that the Arbitrator examined Nebraska's evidence and rejected Nebraska's contention that there was any "error" in the accounting procedures. To fully understand the significance of Nebraska's omission here, it is necessary to explain Nebraska's maneuvers over the years as it sought to relax its compliance burden by rewriting the formulas used for the Compact accounting.

The Court approved the FSS in its May 19, 2003 Decree, which included Appendix C, entitled "Republican River Compact Administration Accounting Procedures and Reporting Requirements." J1 App. C. The methodology for utilizing the Model to determine imported water supply credit and computed beneficial consumptive use of groundwater is contained in sections III.A.3. and III.D.1. of the accounting procedures, respectively. J1 App. C at C17, C20. The procedures make comparisons between Model runs to assess the impacts of four human-induced stresses, namely (1) pumping in Colorado, (2) pumping in Kansas, (3) pumping in Nebraska, and (4) the effect of imported water supply. *Id.* For each of these four stresses, the baseline run used for comparison purposes is the actual, historical condition, which is the condition of the Basin with all pumping and imported water supply included. See J1 App. C § III.D.1., at C20.

Before the August 15, 2007 meeting of the RRCA, the Engineering Committee discussed a Nebraska proposal (later defined as the "5-Run Proposal") to change the RRCA Accounting Procedures. *See* Dkt. 220, Ex. D at 8, 11-15. The FSS requires that "[a]ny matter relating to Republican River Compact administration," including issues related to the FSS, be "[s]ubmitted to the RRCA." Rep. App. E § VII.A.1, at E47 The 5-Run Proposal was not submitted to the RRCA as required by the FSS. Tr. 534:8-19 (Master), 777:2-4 (Wolfe); J7 at 15 n.44.

On August 6, 2008, Nebraska proposed a different change to the RRCA accounting procedures. That proposed change, which is known as the "16-Run Proposal," was what Nebraska actually presented to the RRCA and what ultimately became Nebraska's First and Amended Counterclaims in this case. Both Colorado and Kansas rejected the 16-Run Proposal in the RRCA. *See, e.g.*, K49 at 1-2; C03 at 6-7.

The FSS provides that disputes over changes to the accounting procedures "shall be submitted to non-binding arbitration." Rep. App. E § VII.A.7., at E49-E50. The requirement that an issue be submitted first to the RRCA and then to non-binding arbitration serves two valuable purposes. First, the obligation to present an issue to the RRCA along with the "supporting materials" allows the States the opportunity to utilize their technical expertise to fully evaluate and discuss proposed issues. *Id.* § VII.A.6., at E49. In turn, these discussions can, and often do, result in mutually acceptable resolutions of technical issues. *See, e.g.*, J3 at JT2151 (amending accounting procedures in 2005); J2 (accounting procedures, as amended). Second, if an

issue is unresolvable, the arbitration process provides notice of the outstanding issues and helps the States to crystalize and develop the factual and technical bases of a dispute before filing an action in this Court.

Rather than pursue the 5-Run Proposal, however, Nebraska submitted the 16-Run Proposal to arbitration. Colorado vehemently opposed the proposal, *see* C01 at 3-4 (list of objections), as did Kansas. The Arbitrator, an engineer and former state water administrator, ruled against the 16-Run Proposal. J7 ¶ 2, at 71. He reasoned that Nebraska's proposed changes to the procedures were not warranted because the States had deliberately selected the existing methodology, *see id.* ¶¶ 21-23, at 9, and the results that it produced were "anticipated by the Technical Groundwater Modeling Committee that developed the RRCA Groundwater Model." *Id.* ¶ 24, at 10.

The Arbitrator acknowledged that obtaining a "true value" for actual water supply and consumption is not possible, and that any accounting procedures are an estimate of actual conditions. *Id.* ¶ 16, at 7; *see also id.* ¶ 24, at 9-10. He correctly found that basing the Model on the historical baseline run "would likely simulate stream drying at some locations during certain years, resulting in a nonlinear response." *Id.* ¶ 24, at 9-10. But he concluded that the States recognized this nonlinearity when they developed the Model. *Id.*

In reaching these conclusions, the Arbitrator relied on the testimony of the States' witnesses who were present during the development of the Model. *Id.* ¶ 24, at 10 & n.25 ("[Kansas Expert] MR. LARSON: ... There were several nonlinear features in the model that were, in my view, pretty obvious."); *id.* at 10 n.26 ([Counsel

for Colorado]: Doctor, when did you first become aware of the nonlinearity of the model?; [Colorado's Expert] DR. SCHREÜDER: About 15 minutes after I saw it the first time.").

Thus the Arbitrator rejected Nebraska's contention that the accounting procedures contained an "error" when "modeled groundwater use by any of the three States, individually or in combination, fully depletes streamflow." J7 ¶ 20, at 8; *see also id.* ¶ 21, at 9 (States did not assume the Model would act in linear fashion "under all conditions"); *id.* ¶ 2, at 71 (Nebraska's proposed changes to the procedures "should not be adopted"). Instead, the Arbitrator correctly left it to the States to decide whether to amend what they had agreed to in the FSS accounting procedures, recommending that the States reconvene the committee that worked on the Model to "thoroughly re-evaluate the nonlinear response of the RRCA Groundwater Model when simulated stream drying occurs." *Id.* ¶ 2, at 71.

3. Until Colorado Reached A Secret Agreement With Nebraska On The Eve Of Trial, Colorado Agreed With Kansas That The Accounting Procedures, As Written, Accurately Reflected The States' Original Agreement.

Finally, Nebraska mischaracterizes how its evolving counterclaim, *i.e.*, its "solution" to the "problem," was handled in this proceeding by stating that "[i]n May 2012, Nebraska and Colorado agreed on the proper solution to the problem presented by the RRCA Accounting Procedures," and the "Special Master afforded Kansas additional time to address it." Neb. 6.

After the arbitration, Kansas sought and was granted leave to file its Petition in this Court. Nebraska counterclaimed, assuring the Master that the counterclaim it was asserting in this proceeding was exactly the same as the claim Nebraska asserted in the arbitration. At the hearing on Nebraska's Motion for Leave to File Counterclaims, the Master requested assurance from Nebraska that it sought the "exact same change that you presented below to the RRCA and to the Arbitrator," and that it relied on the "exact same expert analysis." Nebraska confirmed that was its intention. Dkt. 135 Tr. 53:4-13 (the Master questioning counsel for Nebraska). Nebraska's original counterclaims and amended counterclaims and cross-claim all sought the 16-Run Proposal. Dkt. 23 ¶¶ 45-46, at 15; Dkt. 58 ¶¶ 40-41, at 15, ¶¶ 29-30, at 22, & Ex. A. Both in its Answer to Nebraska's Counterclaim and its Answer to Nebraska's Amended Counterclaim and Cross-Claim, Colorado denied Nebraska's claim that there was a problem with the accounting procedures. *Compare* Nebraska Answer and Counterclaims, Dkt. 23 ¶ 48, at 16 *with* Colorado Answer to Nebraska's Counterclaims, Dkt. 39 ¶ 48, at 10; *compare* Nebraska Answer and Amended Counterclaims and Cross-Claim, Dkt. 58 ¶ 43, at 15, ¶ 32, at 22 *with* Colorado Answer to Nebraska's Amended Counterclaims and Cross-Claim, Dkt. 69 ¶ 43, at 10, ¶ 32, at 18.

For almost a year, the States litigated Nebraska's 16-Run Counterclaim, including conducting discovery and submitting competing expert reports on the proposal. This entire time, Colorado opposed Nebraska's Counterclaim and *no* party, including Nebraska, advocated the adoption of the 5-Run Proposal.

On April 10, 2012, Nebraska and Colorado entered into a "Privileged and Confidential Stipulation" in which they switched direction and suddenly agreed to pursue the 5-Run Proposal. Nebraska and Colorado did not immediately disclose their agreement, however. Instead they decided to wait 35 days—until the eve of trial, after discovery closed, and after dispositive motions had been filed—before revealing their agreement to the Master. Nebraska and Colorado's "intentional decision to sit on it for five weeks after entering into the stipulation ... placed Kansas and [the Master] in quite a bind." Tr. 534:8-19 (Master).

Under the secret agreement, Colorado benefitted because Nebraska agreed to support future RRCA proposals by Colorado. N1009 ¶¶ 2, 3. Nebraska gained because Colorado promised to switch its original position in this case and now support Nebraska, including backing Nebraska's proposed changes to the existing RRCA accounting procedures. *Id.* ¶ 4. Colorado also imposed an important condition to obtain its support, namely that Nebraska drop the 16-Run Proposal in favor of the 5-Run Proposal. *Id.* ¶ 4 & Ex. 2 at 213-214 (showing changes to accounting procedures).

It is not hard to understand why Colorado agreed to switch sides in this proceeding. Under the 16-Run Proposal, Colorado's compact compliance balance would be *negatively* affected. Tr. 685:5-8 (Schreüder). By contrast, under the 5-Run Proposal, Colorado would suffer no accounting consequences whatsoever. C10 at 60 (table showing estimated average change in compact balance for years 2003-2059). Nebraska's about-face on the 16-Run Proposal eliminated the potential for future harm to Colorado, and Nebraska sweetened the deal by

promising to back Colorado's own disputed initiatives in the RRCA. This maneuvering by Nebraska and Colorado highlights that no accounting procedure is completely accurate, and necessarily cannot be, when the state of the science does not permit the States to actually measure every drop of water used in the Basin, nor necessarily identify the source of that water. *See* J7 ¶ 16, at 17.

Kansas only found out about the Nebraska-Colorado agreement because the Master compelled Nebraska and Colorado to disclose it, and he did so because he thought its secrecy would undermine the integrity of the litigation process and virtually guaranteed unfairness to Kansas: "the agreement purports to bind the parties to take certain positions in the proceeding before [the Master and the Court], and may plausibly be said to therefore have a potential effect on the testimony of some witnesses." Dkt. 278.

Kansas objected to the last-minute change in Nebraska's Counterclaim, arguing that the 5-Run Proposal uses a methodology that had not been presented to the RRCA, and that the Arbitrator had not been given an opportunity to consider it. *See* Dkt. 223; Dkt. 224; Dkt. 254; Dkt. 255; Dkt. 353 at 4-15. The Master recognized that Nebraska and Colorado had played a "cat and mouse game," Tr. 1841:2-4, and their abrupt switch to a new 5-Run Proposal at the "eleventh hour," "precluded the Court from being able to rule on the merits of [the] newly chosen remedy with assurance that Kansas has had its fair say about the remedy." Dkt. 416 at 38-39. *See also* Tr. 1840 (Master) (problem was "compounded" by "an intentional delay in

bringing [the Stipulation] to this Court's attention in this case").

Kansas is not now asking for any additional proceedings or a remand to the Master to remedy the unfairness the secret agreement and its last-minute revelation created. But, by glossing over the fact that Colorado originally agreed with Kansas that the existing accounting procedures accurately reflected the States' understanding and intent when they agreed to those procedures, both Nebraska and Colorado in their opening briefs present a misleading view of the record: they fail to confess the significance of their secret, sweetheart deal regarding the accounting procedures, including Colorado's motives for changing its longstanding position that there was no "mistake" in the existing accounting procedures.

II. DISGORGEMENT IS APPROPRIATE HERE.

Notwithstanding Nebraska's well-documented serial violations of the Compact, Nebraska and Colorado ask the Court to reject the Master's finding that even minimal disgorgement is appropriate here. According to Nebraska, "there is no need to incentivize Nebraska to comply with the Compact." Neb. 15. Nebraska instead asks the Court simply to trust Nebraska to start meeting its Compact obligations in spite of years of documented non-compliance. In short, Nebraska wants no real accountability in the event it fails yet again to meet its Compact obligations.

History has shown that Nebraska's promises to comply often fall short. When Compact compliance requires any significant effort or sacrifice on Nebraska's part, litigation in this Court has been the

only incentive that has motivated Nebraska to act. *See* Tr. 1870:20-25. Kansas' experience since 2002 and Kansas' continuing vulnerability to Nebraska's self-interest, both counsel in favor of robust remedies for Nebraska's repeated Compact violations. Disgorgement is one such remedy, and the Master was right to recommend it, although Kansas respectfully maintains that the relatively small amount he recommended (compared to Nebraska's gains, which the Master estimated to vastly exceed the amount he suggested disgorging) is too low to be effective given both Nebraska's pattern of violations and its likely gains from future violations.

This Court should require disgorgement of at least a significant portion of the gains Nebraska realized from its repeated Compact violations because **(1)** in original cases the Court exercises broad equitable discretion to impose effective remedies, **(2)** important sovereign and economic interests are at stake in the Compact, and **(3)** the rationales for disgorgement make the remedy applicable here.

Nebraska and Colorado seek to limit this Court's broad discretion to fashion an effective remedy in this case by advocating an unjustifiably restrictive view of all three of these important considerations. The Court should reject Nebraska's and Colorado's invitation to narrowly circumscribe the Court's equitable power in original jurisdiction cases: *all* effective remedies should be on the table.

A. Nebraska And Colorado Argue For A Cramped View Of This Court's Power To Do Equity In Original Actions Involving Interstate Compacts.

1. Nebraska And Colorado Would Unjustifiably Constrict This Court's Discretion To Impose Effective Remedies.

Nebraska and Colorado ask this Court to reject the Master's recommendation that Nebraska's violations of the Compact warrant disgorgement. Their argument relies on a miserly view of this Court's power to do equity in original actions, and their view finds no support in the Court's cases.

As more thoroughly discussed in Kansas' opening brief, Kan. 35-36, 44-46, this Court's discretion to craft an effective remedy in original cases involving interstate river disputes is broad. The Court's determination of what is fair and equitable in a particular original case should be guided by—but not limited to—general principles of remedies and other persuasive law. *See, e.g.*, *Kansas v. Colorado*, 556 U.S. 98, 102 (2009) (choosing to apply a federal statute for determining recoverable litigation costs only after finding "no good reason why the [statutory] rule" should not apply in original cases); *id.* (Roberts, C.J., concurring) (emphasizing that it is this Court's prerogative "to determine matters related to our original jurisdiction"); *Texas v. New Mexico*, 482 U.S. 124, 132 n.8 (1987) (the Court is "not bound" by the general rule that courts may not award post-judgment interest absent statutory authority); *cf., e.g.*, *Virginia v. West Virginia*, 238 U.S. 202, 241 (1915) (setting the "equitable proportion" of interest on public debt due to

Virginia based on the Court's assessment of what was "fair").

Yet Nebraska and Colorado argue that this Court's power to fashion a remedy for Nebraska's compact violations is "limited to" awarding Kansas the estimated amount of its loss. Neb. 11, 12; Colo. 2, 4, 8, 11. This cannot be true. In original actions, the Court has not hesitated to impose remedies beyond a State's estimated losses when such remedies are necessary to provide a durable solution to the dispute. *See, e.g.*, *Texas v. New Mexico*, 485 U.S. 388, 389-394 (1988) (enjoining New Mexico to comply with the Pecos River Compact and appointing a river master); *Kansas v. Colorado*, 556 U.S. at 102 (awarding expert fees); *cf. Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (Court has broad and flexible equitable power to remedy violations of federal statutes). Nebraska's and Colorado's attempts to limit this Court's authority are plainly contrary to the Court's cases. *See, e.g.*, *Florida v. Georgia*, 58 U.S. 478, 493 (1854) (the Court is not "bound, in a case of this kind, to follow the rules and modes of proceeding in the English Chancery, but will deviate from them where the purposes of justice require it, or the ends of justice can be more conveniently attained").

2. Nebraska And Colorado Seek To Diminish The Compact By Treating It As An Ordinary Private Contract.

Nebraska and Colorado seek to diminish the Compact by asking this Court to treat the Compact as though it were an ordinary commercial contract for widgets, a common commercial setting in which efficient breach and expectation damages would be the

rules. But of course the Compact is no ordinary contract at all; it is an interstate agreement between sovereigns that apportions a shared and scarce resource—water. Indeed, an important purpose of the Compact, and the reason Kansas seeks to enforce it now, is to provide an equitable division of water for *all* of the States involved. *See* Compact Art. I, Rep. App. B, at B2.

Nebraska's and Colorado's minimalist view of the Compact, and Nebraska's formalistic appeal to "traditional" contract remedies, mischaracterize the nature of the Compact and undermine Kansas' fundamental interest in Compact compliance. Nebraska and Colorado also defy the Court's recognition of the unique status of Compacts. *See New Jersey v. New York*, 283 U.S. 336, 342 (1931) ("[d]ifferent considerations come in when we are dealing with independent sovereigns"; a "river is more than an amenity, it is a treasure," "[i]t offers a necessity of life that must be rationed among those who have power over it"); *see also* Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 693 (1925) (the Compact Clause was born of an effort to "secure the authority of the Confederacy against political rivalry" by limiting the "'sovereignty, freedom and independence' 'retained' by each State"). And they ignore the legal fact that the Compact "is not just a contract; it is a federal statute enacted by Congress ...." *Alabama v. North Carolina*, 560 U.S. 330, 351 (2010); *see also Texas v. New Mexico*, 462 U.S. 554, 564 (1983) (quoting *Cuyler v. Adams*, 449 U.S. 433, 438 (1981)).

Thus, the premise of Nebraska's and Colorado's argument for limited contract remedies in this case is without merit. To the contrary, disgorgement is an appropriate remedy here.

B. Disgorgement Is An Appropriate Remedy In This Case, Even If Nebraska Did Not Purposely Violate The Compact.

The Master correctly found that Nebraska knowingly violated the Compact in 2005 and 2006. Rep. 112, 130; *see also supra* Part I.B. Nebraska's knowing and repeated violations of the Compact warrant the remedy of disgorgement of a significant amount of Nebraska's gains. Kan. 44-53. But even if this Court rejects the Master's finding that Nebraska knowingly violated the Compact, disgorgement would still be warranted. The history of Nebraska's violations of the Compact, the importance of Kansas' interest in maintaining the Basin as a viable source of water, and Kansas' inability to effectively protect its interests under the status quo, all justify awarding disgorgement in this case.

Although Nebraska's culpability may be considered as a factor in determining the *amount* of disgorgement,[4] the *availability* of disgorgement in original actions should not turn on a Compact violator's

---

[4] Colorado argues that the $1.8 million in disgorgement that the Master recommends is "arbitrary and would result in a windfall to Kansas." Colo. 10. To the extent this argument relates to the *amount* of disgorgement, not the *availability* of disgorgement as a possible remedy, Kansas agrees that the Court should reject the Master's recommendation of $1.8 million—not because it is too high, but because it is *too low* to be effective. *See* Kan. 53-59.

state of mind. *See* Rest. (Third) Restitution Part III, Ch. 7 intro. note ("the *measurement* of unjust enrichment frequently turns on a judgment about the defendant's degree of fault") (emphasis added); *see also id.* §§ 49-52; *id.* § 50 cmt. a (defendant's "fault" guides the "choice between ... two or more *measures* of ... unjust enrichment") (emphasis added). This is particularly true here because Nebraska repeatedly exceeded its allocations under the Compact and did not take any real steps toward compliance until Kansas initiated this original action. Again, the touchstone for crafting remedies in original actions is to "best promote the purposes of justice." *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 98 (1861).

1. The Rationales For Disgorgement Support That Remedy In This Case.

Disgorgement is available in a number of contexts, including breach of fiduciary duty, breach of contract, and tort. Rest. (Third) Restitution §§ 39, 40, 44. The unique nature of interstate compacts implicates all three of these areas of law. *See* Kan. 44-53; *cf.* Rest. (Third) Restitution § 39 cmt. d (it is not uncommon for "contract rights [to] resemble noncontractual entitlements that are routinely protected against interference by a disgorgement remedy in restitution"). The general rationales of disgorgement are both equitable and practical: to **(1)** prevent unjust enrichment, **(2)** effectuate the purpose of an agreement, and **(3)** eliminate the economic incentive to violate another's rights.

First, disgorgement is meant to divest a party of unjust enrichment, that is, a benefit the party received at the expense of another. *See* Rest. (Second) Contracts

intro. note; *see also id.* § 345(d); Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 504, 504 (1980) ("restitutionary claims should be recognized in a wide variety of cases in which one person's interests have been 'appropriated' by another, whether or not the appropriation was tortious," based on "the nature of the interest infringed rather than the character of the infringement"). Disgorgement is appropriate "when a significant cause of the defendant's unjust enrichment is the defendant's ... negligence," "breach ... of a contract" or "unreasonable failure, despite notice and opportunity, to avoid or rectify the unjust enrichment in question." Rest. (Third) Restitution § 52; *see also id.* § 52 cmt. a ("A restitution defendant may be responsible for the transaction giving rise to the defendant's unjust enrichment, even though the defendant is neither a tortfeasor nor otherwise liable for interference, conscious or otherwise, with the claimant's legally protected interests.").

Second, the "broader function of disgorgement ... is not merely to frustrate conscious wrongdoers but to reinforce the stability of the contract itself," Rest. (Third) Restitution § 39 cmt. b, particularly where, as here, "expectation damages pose a significant risk of undercompensation," E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339, 1368 (1985). Thus disgorgement serves similar "contract-reinforcing objectives" as injunctive relief and specific performance, Rest. (Third) Restitution § 39 cmt. b, which protect "a party's contractual entitlement that would be inadequately protected by the legal

remedy of damages for breach," *id.* § 39 cmt. a, b. *Cf.* Rest. (Second) Contracts §§ 359-360 (an injunction is appropriate where damages would be inadequate based on the difficulty of proving damages with reasonable certainty and the difficulty of procuring a suitable substitute performance by means of money awarded as damages). A "party who exposes the injured party to such a risk [of undercompensation] by breaking a contract, and who then puts equitable relief out of the other party's reach," by paying the injured party's estimated (but undervalued) damages, "arguably should be required to disgorge any gain resulting from the breach." Farnsworth, *supra* at 1368.

Kansas' "[v]ulnerability" stems not only from "the difficulty ... [of] recovering, as compensatory damages, a full equivalent of the performance for which [Kansas] has bargained," Rest. (Third) Restitution § 39 cmt. b, but also from the inescapable geographic advantage that Nebraska has as the predominantly upstream state. Although Nebraska repeatedly argues that Kansas' recovery should be limited to "actual damages," Neb. 2, 9, 10, 20, this mischaracterizes the Master's conclusion that "the amount of Kansas' loss is quite uncertain, and likely unknowable, but that $3,700,000 is a fair estimate," Rep. 138. *See also* Neb. 7 (admitting that $3.7 million is simply an "approximation of Kansas' actual damages"). Moreover, the "performance for which [Kansas] has bargained," Rest. (Third) Restitution § 39 cmt. b, is *water*. Anything else, much less an "approximation" of Kansas' loss nearly ten years after the fact, is a poor substitute for Kansas' right to water under the Compact.

Any remedy that does not deter Nebraska from future violations would permit Nebraska to "exploit the shortcomings of [Kansas'] damage remedy" by "accept[ing] the price of the promised performance, then deliver[ing] something less than what was promised." *Id.* § 39 cmt. b. The "mere possibility of such outcome undermines the stability of" the Compact in which Nebraska's performance "may be neither easily compelled nor easily valued." *Id.*

Third, and related to the second rationale, disgorgement "seeks to defeat" a party's calculation that its "anticipated liability in damages is less than the anticipated" benefit from violating the agreement, property right, or fiduciary duty. *Id.*; *see also id.* § 44 cmt. a.

There is no doubt that Nebraska was handsomely rewarded for its repeated violations of the Compact and the FSS. Although the Master did not make a precise factual finding regarding Nebraska's total gains from its violations in 2005 and 2006, he suggested that such gain could have been "over $25 million," Rep. 177, and in any event he found that "Nebraska's gain was ... very much larger than Kansas' loss, likely by more than several multiples," Rep. 178. Absent an effective remedy that strips Nebraska of the strong economic incentive to violate the Compact, Nebraska's history of violating the Compact is likely to repeat itself. The rationales of disgorgement strongly favor invoking that remedy for Nebraska's repeated violation of the Compact.

Yet Colorado contends that any disgorgement would be "arbitrary and capricious" because it would give Kansas a "windfall." Colo. 9-10. This argument begs

the ultimate question, both factually and legally. Factually, Colorado's argument assumes that the Court can precisely quantify Kansas' loss, and that any award above that amount is a "windfall." But the Master, who undertook to calculate Kansas' loss, concluded that "Kansas' loss is quite uncertain, and likely unknowable." Rep. 138.

Legally, under Colorado's theory, *any* disgorgement would be considered a windfall. As a matter of equity, the Court should be careful that awards of disgorgement do not result in a windfall. But Colorado's contention that any and all disgorgement is a windfall mischaracterizes the remedy. *See* Rest. (Third) Restitution § 51 cmt. b (it is not unusual for recovery measured by a defendant's gain to "exceed the loss to the claimant"); *see also, e.g.*, Rest. (Third) Restitution § 40, illus. 8.

Moreover, Colorado's reasoning cuts against its own position: at present, Nebraska has received an enormous windfall from its repeated violations of the Compact at Kansas' expense, and it is *that* windfall that Kansas seeks to remedy here. Although Colorado argues that disgorgement does not "restore the status quo," Colo. 10, neither does allowing an upstream state to retain economic gains that exceed a downstream state's losses by several multiples. Allowing an upstream state to retain the full measure of gains that exceed losses to a downstream state would not "best promote the purposes of justice." *Kentucky v. Dennison*, 65 U.S. (24 How.) at 98.

2. Disgorgement Does Not Require Intent Or Malice.

The Master found that Nebraska's knowing violations of the Compact and the FSS warrant disgorgement in this case. *See* Rep. 112, 130, 179-180. He was correct in both conclusions: (1) Nebraska repeatedly violated the Compact and the FSS, and did so knowingly; and (2) Nebraska's actions warrant disgorging at least some of Nebraska's gains. Nebraska's track record, *see supra* Part I.B., and general principles of disgorgement, *see supra* Part II.B.1.; Kan. 44-59, support the Master's conclusions.

Yet Nebraska and Colorado take exception to both conclusions. They claim that Nebraska's violations of the Compact and the FSS in 2005 and 2006—which were part of a much longer pattern of Nebraska exceeding its Compact allocations from 2002 through 2006 (and even earlier)—were "unintentional," Colo. 4, and "[un]anticipated," Neb. 17. In turn, they argue that disgorgement is not an available remedy in this case because disgorgement can be applied only to "intentional" or "deliberate" violations that evince "ill intent." Neb. 15-16; Colo. 6-8. Nebraska's and Colorado's conclusions require ignoring this Court's broad power to do equity in original cases, general principles of disgorgement law, and the record in this case. Even if Nebraska did not purposely violate the Compact and the FSS, disgorgement is an appropriate remedy here.

a. Intentional Misconduct Is Not A Requirement For Disgorgement.

Intent is not the indispensable element of disgorgement that Nebraska and Colorado claim it to be, as the Master correctly recognized. He found that Nebraska did not "deliberately opt[] for noncompliance in 2006," Rep. 130, and that Nebraska's Compact violations were not "consciously opportunistic," Rep. 131. But he also found that Nebraska "knowingly failed" to comply with the Compact, Rep. 112, and "knowingly exposed Kansas to a substantial risk that Nebraska's compliance measures would not ensure compliance if the weather did not cooperate," Rep. 130. Based on the totality of the record evidence of Nebraska's repeated failures to comply with its Compact allocations, the Master correctly found that disgorgement is warranted in this case.

Nebraska's intent, or alleged lack thereof, regarding its repeated failures to comply with its Compact allocations may influence the *amount* of disgorgement that is appropriate, but a lack of deliberate intent to violate the Compact—or malice or hostility—does not determine whether disgorgement is *available* in the first place. Indeed, disgorgement should be available whether Nebraska intentionally, negligently, or innocently violated the Compact. *See* Rest. (Third) Restitution § 52 & cmt. a. Here, the record shows that, at best, Nebraska was recklessly or deliberately indifferent in attempting to comply with its Compact obligation, *cf.* Tr. 1870:17-25 (Master); at worst, given Nebraska's failure to act in the face of known and impending overuse, Nebraska's violations could be labeled deliberate or intentional. Either way,

disgorgement is available and appropriate here. Rest. (Third) Restitution § 51 cmt. a (disgorgement warranted where risk of liability is known, even though the legal conclusion that a wrong has been committed may not be reached until after the fact); Farnsworth, *supra* at 1368 (disgorgement warranted for exposing an injured party to the risk of undercompensation by breaking a contract and putting equitable relief out of reach by paying the injured party's estimated damages).

Although "[r]estitution by a profit measure (often called 'disgorgement') is normally directed at conscious wrongdoers—not against blameless tortfeasors whose conduct would not be affected by the prospect of liability measured by wrongful gain," disgorgement allows even "a culpable (typically negligent) claimant to recover from a defendant who is altogether blameless." Rest. (Third) Restitution Part III, Ch. 7 intro. note. Thus, "innocent converters or trespassers, or unwitting infringers," Rest. (Third) Restitution § 51 cmt. a, b—which Nebraska claims to be—are subject to disgorgement "of benefits obtained by the misconduct of the defendant, culpable or otherwise," *id.* § 51(2). *See also id.* § 51 cmt. a; *id.* § 51 cmt. b ("Persons who are without fault are frequently liable in restitution....").

Moreover, disgorgement for breach of a fiduciary, or fiduciary-like, duty "is not restricted to conscious wrongdoers": "the prophylactic aims of fiduciary duty require a fiduciary to disgorge profits (including consequential gains) even if the breach of duty is inadvertent." Rest. (Third) Restitution § 43 cmt. h; *see also id.* § 43 cmt. a ("a disloyal fiduciary—without regard to notice or fault—is treated as a conscious

wrongdoer"). And when the Court exercised broad equitable powers in *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), to require disgorgement of rents collected by the defendant in excess of the maximum rents established by the Emergency Price Control Act of 1942, the Court did not rest its analysis on whether the defendant's violations were intentional or not.

In addition to attacking the standard for disgorgement, Nebraska argues that due to the retrospective nature of the accounting regime in place, it had no way of knowing that it would violate the Compact until after it had already done so. As discussed above in Part I.B. and below in Part II.B.3., the record evidence does not support such a claim. Regardless, disgorgement is appropriate even in "contexts in which—although the risk of liability is known—the legal conclusion that a wrong has been committed may not be reached until after the fact." Rest. (Third) Restitution § 51 cmt. a. One who chooses to act in such circumstances anyway "bears the risk of liability by a disgorgement measure," *id.*, which may include both "profits and ... losses." *Id.* § 51 cmt. j. In such a case, "the claimant is free to pursue the most advantageous remedy in light of the outcome." *Id.*

These general principles of disgorgement should guide this Court's exercise of its discretion in crafting an effective remedy in this case. Admittedly, such general principles are not binding on this Court. They do, however, provide a compelling basis for the Court to require disgorgement of at least a significant portion of the gains Nebraska accrued at Kansas' expense. *Id.* § 39 (disgorgement of profits "permits some shaping of the remedy to accord with the equities between the

parties, if only in the measurement of the profits 'realized ... as a result of the breach'"). Indeed, given that Nebraska repeatedly has exceeded its allocations under the Compact, disgorgement is the next logical step to ensure compliance with the Compact.

b. The Court Enjoys Broad Equitable Power To Impose Effective Remedies In Original Cases.

Based on an unjustifiably narrow view of the Court's equitable power and the unique nature of the Compact, Nebraska and Colorado maintain that disgorgement is not a proper remedy in this case. Grasping at straws, Colorado also contends that "[t]his Court should follow its previous decisions limiting damages to Kansas' loss" where "the underlying breach of compact was not intentional." Colo. 7-9. But there are no such "decisions" of "[t]his Court." Rather, Colorado relies on Special Master Littleworth's Second Report in *Kansas v. Colorado*, No. 105, Orig. (1997) (Littleworth Rep.) and argues that this Court silently (and at best unwittingly) endorsed *all* aspects of that report, even the parts to which no State objected.

In support of his decision not to recommend disgorgement in *Kansas v. Colorado*, Master Littleworth found that Colorado had not "deliberately set out to reap the benefits of a wilful failure to perform its obligations under the compact." Littleworth Rep. 77. He thus considered the intent of the Compact violator as a factor in determining whether disgorgement was appropriate; he did not, as Colorado contends, find that deliberate, willful violation is the *sine qua non* of disgorgement. *See id.* at 80. As discussed above in Part II.B.2.a., it clearly is not. Indeed, Master Littleworth

noted that "the power of equity to provide complete relief" could "look[] to upstream gain under appropriate circumstances." *Id.* at 82.

Regardless, the Littleworth Report is simply that—a *report*. Yet Colorado argues that because (1) Master Littleworth recommended denying Kansas' request for disgorgement in *Kansas v. Colorado*, (2) Kansas did not file exceptions to that report, and (3) the Court said nothing about disgorgement in its opinion, "the Court's silence 'implies acceptance, not rejection, of the Special Master's underlying methodology.'" Colo. 8-9 (quoting *Kansas v. Colorado*, 543 U.S. 86, 98 (2004)). Colorado misrepresents this Court's reasoning in *Kansas v. Colorado*, which simply states that "(despite Kansas' argument) we did not change the methodology for calculating the *what*," *i.e.*, Early as opposed to Middle or Late Damages, "we [only] changed the *when*." *Kansas v. Colorado*, 543 U.S. at 98. So "[i]n context, our silence fairly implies acceptance, not rejection, of the Special Master's underlying methodology." *Id.*

In *Kansas v. Colorado*, 533 U.S. 1 (2001), this Court said absolutely nothing about disgorgement, and rightly so because Kansas did not take exception to the Master's recommendation to deny disgorgement. There is no basis to imply that the Court blesses every part of a Special Master's report—especially its legal analysis—that the Court does not comment on, including the portions that no party challenges. Kansas' litigation decision not to take exception to Master Littleworth's recommendation regarding disgorgement should not be held against it more than a decade later in a different case, with different facts.

If the Court is not bound by generally applicable statutes in original jurisdiction cases, *see Kansas v. Colorado*, 556 U.S. at 109 (Roberts, C.J., concurring), then certainly it is not bound by its *silence* with respect to *unchallenged* portions of the legal analysis in a special master's *report* in an earlier, separate case.

Although the Court has never addressed the measure of a disgorgement award in an interstate river case, there can be no doubt that the Court has the power to make such an award as part of its equitable authority to tailor the relief in original cases to fit the circumstances and provide effective remedies.

3. The Record Evidence Of Nebraska's Non-Compliance More Than Proves The Propriety Of Disgorgement As A Remedy In This Case.

Notwithstanding Kansas' diligence in documenting its concerns about Nebraska's repeated overuse of water, and Kansas' repeated efforts to convey and provide all of that information to Nebraska, Nebraska has persistently ignored the factual documentation showing that Nebraska has been exceeding its allocations under the Compact for a very long time. *See* K24 at KS728-KS729. Indeed, decades ago, Nebraska must have realized that it likely was not complying with its Compact obligations because in 1991 it single-handedly defeated a motion by Kansas in the RRCA to require the member states to "take whatever measures are necessary to stay within their annual adjusted allocations." *Id.* (citing RRCA 32nd Annual Report, J3 at JT1840).

When the states signed the FSS in 2002, Nebraska "understood" that it would have to reduce its

consumption to achieve compliance. *See* Rep. 106. Nebraska also "well understood at that time" that reducing groundwater pumping would have a delayed effect on stream flow. *Id.* The FSS provided for multi-year running averages as a means of allowing the upstream states opportunities to correct instances of overuse. *Id.* A five-year compliance test is normally used in measuring average consumption. Rep. App. E § IV.D., at E34. However, in water-short years, a two-year compliance test is used. Rep. App. E § V.B.2.e.i., at E41.

The use of running averages benefits Nebraska by giving it flexibility in meeting its Compact obligations. But it also reveals Nebraska's stubborn reluctance to comply with the Compact and the FSS. The use of multi-year running averages to determine compliance with the Compact and FSS gave Nebraska the data it needed to take corrective action in order to comply with the Compact. Nebraska simply chose not to take the steps necessary to reduce its consumption, even though time and again Nebraska knew that it was on track to violate the Compact.

Nebraska knew at the time it signed the FSS that any overuse during 2003, 2004, 2005, or 2006 would create a deficit that Nebraska would have to offset during some other year within the first compliance period. Nebraska also knew that if 2006 were a Water-Short Administration Year, overuse in 2005 would create a deficit that would have to be remedied in 2006.

Yet Nebraska's reckless march to non-compliance started in the very first year under the FSS. In 2003, Nebraska exceeded its allocation by 25,420 acre-feet. Rep. 108. By spring 2004, Nebraska knew that it had

exceeded its allocation in 2003, and knew that it needed to reduce its consumption. Rep. 108. Yet in 2004, Nebraska exceeded its allocation again, this time by 36,640 acre-feet. *Id.* In 2005, Nebraska's overuse increased yet again, this time to 42,860 acre-feet. Rep. 109. Undeterred, Nebraska's non-compliance continued in 2006 when Nebraska exceeded its allocation by 28,009 acre-feet.

Nebraska's repeated overuse was not trivial. In 2005 and 2006 alone, Nebraska exceeded its allocation by 70,869 acre-feet, enough water to sustain a city of one million people for a year. The Master described Nebraska's attitude toward compliance in 2005 and 2006 as "at the very best [one of] reckless indifference," which changed "only because Kansas took great efforts to commit and commence this litigation." Tr. 1870:22-25 (Master). He found that Nebraska "knowingly failed" to comply with the Compact in 2005 and 2006, Rep. 112, and "knowingly exposed Kansas to a substantial risk that Nebraska's compliance measures would not ensure compliance if the weather did not cooperate," Rep. 130.

The reason Nebraska exceeded its Compact allocations? "Possessing the privilege of being upstream, Nebraska paid more attention to its internal concerns than to its obligations to the downstream state." Rep. 130.

Nebraska and Colorado entirely ignore Nebraska's lengthy history of exceeding its Compact allocations, and risibly describe Nebraska's "efforts" during 2003-2006 as "good faith efforts to comply," Neb. 2, and "earnest, and substantial enough," Colo. 1, while asserting that "Nebraska officials tried but failed to

comply with the Compact." These self-serving assertions, belied as they are by the record evidence, instead demonstrate the cavalier attitude of the two primarily upstream states in this Compact to the obligations they owe to the primary downstream state.

Indeed, Nebraska's strongest effort to "comply" with the Compact has not come in the form of any tangible attempts to reduce its actual consumption of water, but rather its manipulations (including the secret agreement with Colorado) to rewrite the existing accounting procedures in order to reduce the calculation of Nebraska's annual consumption mathematically. In other words, Nebraska does not want to change its behavior, only the way its behavior is measured. Robust remedies, including disgorgement, are necessary to put an end to Nebraska's intransigence.

The vehemence with which Nebraska and Colorado attack the idea of disgorgement as a remedy in an interstate water dispute speaks volumes. Their strenuous objections reflect, in a crystal clear way, that disgorgement will in fact work to deter Compact violations by upstream states. Disgorgement is particularly appropriate here because history unfortunately has proven that Kansas' position under the Compact is vulnerable to abuse by Nebraska.

While Kansas seeks in this litigation to enforce the Compact, Nebraska and Colorado fight to establish some prerogative to violate the Compact at will, and with little real consequence. Nebraska's and Colorado's opposition to the very concept of disgorgement equates to asking the Court to look the other way, in effect to condone their ability to violate the Compact with

virtual impunity in future water-short years. The Court should not do so, and certainly not where, as here, the evidence demonstrates a longstanding and knowing disregard for complying with the Compact. Both the law and the evidence strongly support ordering the disgorgement of a significant portion of Nebraska's gain.

CONCLUSION

For the reasons set forth above, Kansas respectfully requests that the Court deny Nebraska's and Colorado's exceptions to the Master's recommendation that disgorgement is an appropriate remedy in this case. The long history of Nebraska's persistent violations of the Compact and the FSS more than warrant disgorgement of a significant amount of Nebraska's gains.

Respectfully submitted,

DEREK SCHMIDT
Attorney General of Kansas
STEPHEN R. MCALLISTER
Solicitor General of Kansas
(Counsel of Record)
JEFFREY A. CHANAY
Deputy Attorney General
CHRISTOPHER M. GRUNEWALD
Assistant Attorney General
BURKE W. GRIGGS
Special Assistant Attorney General
BRYAN C. CLARK
Assistant Solicitor General
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
steve.mcallister@trqlaw.com

JOHN B. DRAPER
DRAPER & DRAPER LLC
325 Paseo de Peralta
Santa Fe, NM 87501

JEFFREY J. WECHSLER
MONTGOMERY & ANDREWS, P.A.
325 Paseo de Peralta
Santa Fe, NM 87501

Counsel for Plaintiff
State of Kansas